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Attorney for Plaintiff  
EDWARD MILLER

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

EDWARD MILLER,

Plaintiff,

v.

APPTIO, INC. and CLOUDABILITY, INC.,  
et al.,

Defendants.

Case No. 4:19-cv-07762-HSG

JOINT CASE MANAGEMENT  
CONFERENCE STATEMENT AND  
[PROPOSED] ORDER

Date: March 5, 2020  
Time: 2:00 p.m.  
Courtroom: 2  
Judge: Hon. Haywood S. Gilliam, Jr.

Action Filed: November 25, 2019

1 The parties to the above-entitled action respectfully submit this JOINT CASE  
2 MANAGEMENT STATEMENT & PROPOSED ORDER pursuant to the Standing Order for  
3 Civil Cases Before District Judge Haywood S. Gilliam, Jr., and the Standing Order for All Judges  
4 of the Northern District of California, and Civil Local Rule 16-9.

5 1. Jurisdiction & Service

6 The basis for this Court's subject matter jurisdiction is 28 U.S.C. § 1331 and Section 27 of  
7 the Securities Exchange Act of 1934 (15 U.S.C. § 78aa). All parties have been properly served  
8 with the First Amended Complaint, and no issues exist as to service.

9 2. Facts

10 On April 12, 2016, Defendant Cloudability issued Plaintiff an electronic Warrant to  
11 Purchase Shares of Common Stock (the "Warrant"). The Warrant expressly stated the April 12,  
12 2019 expiration date on the first page. Defendants contend that the Warrant expired within a  
13 three-year period on April 12, 2019. Plaintiff emailed Defendant Cloudability on May 19, 2019,  
14 after Plaintiff learned that Defendant Cloudability was to be acquired by Defendant Apptio, citing  
15 the three-year expiration period and asking if the Warrant was "in the money." Plaintiff later that  
16 day called attention to a ten-year expiration period displayed in Carta, a third party application that  
17 Plaintiff contends he was required by Defendant to use with respect to the Warrant. Attached to  
18 Plaintiff's second email was a Carta screenshot of a document entitled "Warrant CSW-003" with  
19 an April 12, 2026 expiration date.

20 Plaintiff further contends that an attorney for Defendant Cloudability changed the display  
21 in Carta after Plaintiff brought it to Defendant Cloudability's attention and did not allow Plaintiff  
22 to exercise the Warrant. On February 10, 2020, Plaintiff filed a First Amended Complaint for  
23 negligent misrepresentation, fraud, and securities fraud.

24 On February 24, 2020, Defendants filed a motion to dismiss Plaintiff's First Amended  
25 Complaint, on the grounds that: (1) Plaintiff alleges no wrongful acts by Defendant Apptio; (2)  
26 Plaintiff failed to plead particularized facts giving rise to a strong inference that Defendants acted  
27 with fraudulent intent; and (3) Plaintiff failed to allege particularized facts supporting all the other  
28 required elements of his fraud claims. Defendants' motion to dismiss is set for hearing on April 9,

2020. Plaintiff's Response to Defendants' Motion to Dismiss is due March 9, 2020 and has not yet been filed. Plaintiff intends to oppose the Motion to Dismiss on the grounds that (1) Apptio's acquisition of Cloudability creates liability in Apptio; (2) the 1<sup>st</sup> Amended Complaint alleges facts with sufficient particularity to support a strong inference that Defendants acted with fraudulent intent; and (3) the 1<sup>st</sup> Amended Complaint alleges facts with sufficient particularity to support all other required elements of the fraud claims.

3. Legal Issues

In light of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, the current legal issue is whether the Court should dismiss Plaintiff's First Amended Complaint.

4. Motions

On January 29, 2020, Defendants filed a motion to dismiss Plaintiff's Complaint. In response, Plaintiff filed a First Amended Complaint on February 10, 2020. On February 24, 2020, Defendants filed a Motion to Dismiss Plaintiff's First Amended Complaint.

5. Amendment to the Pleadings

Plaintiff filed his First Amended Complaint on February 10, 2020. For the reasons presented in the motion to dismiss, Defendants contend that Plaintiff should not be granted leave to further amend his Complaint.

6. Evidence Preservation

The parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information ("ESI Guidelines"), and confirm that they have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action.

7. Disclosures

The parties have not completed their initial disclosures pursuant to FRCP 26 due to the status of settlement discussions.

1           8.     Discovery

2           Discovery is premature pending the outcome of Defendants' Motion to Dismiss Plaintiff's  
3 First Amended Complaint. The parties have agreed to exchange certain targeted information in  
4 connection with settlement discussions.

5           9.     Class Actions

6           This is not a class action.

7           10.    Related Cases

8           There are no related cases to this matter.

9           11.    Relief

10          **Plaintiff's position:** Plaintiff respectfully requests that the Court accept his 1<sup>st</sup> Amended  
11 Complaint after review of Plaintiff's Response to Motion to Dismiss which will be filed on or  
12 before March 9, 2020. Based on the 1<sup>st</sup> Amended Complaint, Plaintiff is requesting payment in  
13 excess of \$75,000 plus attorney fees as required by the terms in the Warrant.

14          **Defendants' position:** Defendants respectfully request that the Court dismiss Plaintiff's  
15 First Amended Complaint, with prejudice, pursuant to Defendants' Motion to Dismiss Plaintiff's  
16 First Amended Complaint, filed February 24, 2020.

17          12.    Settlement and ADR

18          The parties are in compliance with *ADR L.R. 3-5*, and have completed, filed, and served  
19 the ADR certification and, through their counsel, have met and conferred to select an ADR  
20 process. Specifically, on February 4, 2020, the parties stipulated to participate in an early  
21 settlement conference with a magistrate judge. (See Dkt. 20). The parties respectfully request an  
22 order from this Court referring the matter to an early settlement conference before a magistrate  
23 judge, and are hopeful that the parties can resolve this matter if so referred. The parties have also  
24 reached a Stipulated Agreement requesting that a magistrate be appointed to conduct a settlement  
25 conference at an early, mutually convenient time.

26          13.    Consent to Magistrate Judge for all Purposes

27          At least one party declined magistrate judge jurisdiction for all purposes. (See Dkt. 7).  
28

1           14.    Other References

2           The parties do not believe that this case is suitable for reference to binding arbitration, a  
3 special master, or the Judicial Panel on Multidistrict Litigation. The parties respectfully request  
4 the early appointment of a magistrate judge to conduct a settlement conference.

5           15.    Narrowing of Issues

6           The parties do not believe that the issues can be narrowed at this time.

7           16.    Expedited Trial Procedure

8           The parties do not believe that this is the type of case that can be handled under the  
9 Expedited Trial Procedure of General Order 64, Attachment A.

10          17.    Scheduling

11          Scheduling a trial date and related deadlines is premature pending the determination of  
12 Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. The parties also have a  
13 Stipulated Agreement that the Case Management Conference should be postponed until after a  
14 magistrate judge has conducted a settlement conference with the parties.

15          18.    Trial

16          Trial estimates are premature pending the determination of Defendants' Motion to Dismiss  
17 Plaintiff's First Amended Complaint.

18          19.    Disclosure of Non-party Interested Entities or Persons

19          The parties have filed the "Certification of Interested Entities or Persons" required by Civil  
20 Local Rule 3-15, and certify that the following listed persons, associations of persons, firms,  
21 partnerships, corporations (including parent corporations) or other entities: (i) have a financial  
22 interest in the subject matter or in a party that could be substantially affected by the outcome of  
23 this proceeding: former stockholders of defendant Cloudability, Inc., whose interest is in an  
24 escrow fund (representing a portion of the proceeds from Apptio, Inc.'s acquisition of  
25 Cloudability, Inc.) could be reduced if Plaintiff were to prevail on the claims he asserts.

26          20.    Professional Conduct

27          All attorneys of record for the parties have reviewed the Guidelines for Professional  
28 Conduct for the Northern District of California.

21. Other

The parties respectfully request the early appointment of a magistrate judge to conduct a settlement conference, and respectfully request that the Case Management Conference be continued to a date following the settlement conference. The parties are unaware of other matters that may facilitate the just, speedy, and inexpensive disposition of this matter.

Dated: February 27, 2020

Respectfully Submitted,

By: /s/  
Daniel Remer

Attorney for Plaintiff  
Edward Miller

HOGE, FENTON, JONES & APPEL, INC.

By: /s/  
Alison P. Buchanan  
Christen E. Bourne

Attorneys for Defendant  
Cloudability, Inc.

DAVIS WRIGHT TREMAINE LLP

By: /s/  
Martin L. Fineman

Attorneys for Defendants  
Apptio, Inc. and Cloudability, Inc.

**ATTESTATION**

Pursuant to Civil Local Rule 5-1(i)(3), I attest that I obtained concurrence in the filing of this document from the other signatories.

Dated: February 27, 2020

HOGUE, FENTON, JONES & APPEL, INC.

By: /s/ \_\_\_\_\_  
Alison P. Buchanan  
Christen E. Bourne

Attorneys for Defendant  
Cloudability, Inc.

**CASE MANAGEMENT ORDER**

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

Dated:

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UNITED STATES DISTRICT